Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2323
MARION DALE FLEWALLEN,

Petitioner-Appellant,

v.

GORDON FAULKNER,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 78-C-77—William E. Steckler, *Judge*

SUBMITTED APRIL 20, 1982*—DECIDED MAY 10, 1982

Before WOOD, ESCHBACH, and POSNER, *Circuit Judges.*

PER CURIAM. Petitioner-appellant, Marion Dale

* This appeal was set for argument on April 20, 1982. Counsel for petitioner-appellant apparently was unable to appear and counsel for respondent-appellee, who was notified too late and did appear, orally waived argument. Consequently, this appeal is submitted for decision to the panel for April 20 on the briefs and the record. *See* Fed.R.App.P. 34(e).

Flewallen, appeals from the denial of his petition for a writ of habeas corpus, which raised only one ground for relief: that at his trial Petitioner was denied the right "to be confronted with the witnesses against him..." guaranteed by the sixth amendment. Specifically, Flewallen challenges the admission into evidence, over his vigorous objections at trial, of six prosecution witnesses' out-of-court statements as part of the State's case-in-chief. We affirm.

After a jury trial, Flewallen was convicted of the second degree murder of eighteen-month-old Erica Grigsby, the daughter of his wife, Virgina, from a former marriage, and sentenced to life imprisonment. The evidence is adequately summarized in the opinion of the Indiana Supreme Court which, with one justice dissenting, affirmed Flewallen's conviction, rejecting, *inter alia*, the argument presented in the instant habeas proceedings. *See Flewallen v. State*, 267 Ind. 90, 368 N.E.2d 239, 240 (1977).

At Flewallen's trial, the prosecutor was permitted to admit into evidence, and to read from, transcripts of the six prosecution witnesses' out-of-court statements. The reason for the prosecutor's use of these out-of-court statements in lieu of the witnesses' direct testimony at trial is not apparent from the record. Before each transcript was admitted the declarant examined it and verified its accuracy. Flewallen does not contend either that the statements were not made or that the transcripts admitted at trial were inaccurate.

Although not all of these kinds of statements were admitted with respect to each of the six witnesses, three kinds of challenged statements were admitted into evidence; grand jury testimony; statements to police investigators given shortly after the crime; and a statement to the coroner. However, not all of these statements were read to the jury at trial. Except for the coroner's statement, only one of which was admitted, the challenged statements were in question and answer format. Flewallen was

permitted to object at trial to particular questions and answers on evidentiary grounds. Thus, if the statements were read, the jury did not hear the objectionable portions. Also, the copies of the statements admitted into evidence were redacted, although the objectionable segments remain legible

Both parties agree that Flewallen was not present when the out-of-court declarations were made and that, neither personally nor through counsel, did Flewallen have a contemporaneous opportunity to cross-examine the declarants. However, Flewallen fully cross-examined all six of the declarants at trial.

In *Mancusi v. Stubbs*, 408 U.S. 204 (1972), the Court emphasized that reliability may be paramount when resolving Confrontation Clause problems. Reliability is not a significant problem in the instant case. First, the declarants were present at trial to verify both that they had made the statements and that the transcripts of the statements were accurate. Second, where more than one statement of a particular witness was admitted, the statements were substantially consistent with one another. The challenged statements of the six witnesses also are substantially consistent with one another and are corroborated in some respects by non-challenged evidence adduced at trial.Third, the declarants' ability to observe the occurrences described in the challenged statements as well as the declarants' accuracy and honesty were fully tested by cross-examination at trial. Finally, in one sense, use of the challenged procedure may have benefited. Flewallen. Normally, when a given question and its answer are objectionable the trial judge can only instruct the jury to disregard them. Here, because the questions and answers were subjected to a "pre-clearance" procedure, the jury never was exposed to objectionable ones.

Nevertheless, under the Due Process Clause of the fourteenth amendment, a state criminal defendant is

entitled to confrontation of opposing witnesses as well as compulsory process for obtaining witnesses, as guaranteed by the sixth amendment. *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence For Criminal Cases*, 91 Harv. L. Rev. 567 (1978) (exploring relationship between these two rights). Thus, subject to permissible restrictions which need not be mentioned here, all criminal defendants generally must be afforded an opportunity to cross-examine adverse witnesses fully and effectively. *Davis v. Alaska*, 415 U.S. 308 (1974); *Smith v. Illinois*, 390 U.S. 129 (1968); *Pointer v. Texas*, *supra*. Here, transcripts of six prosecution witnesses' uncross-examined statements were virtually substituted for the witnesses' direct testimony. However, Flewallen does not cite even a single instance in which this unorthodox procedure hampered his ability to cross-examine the declarants. The record confirms that these witnesses were cross-examined fully and effectively. Thus, although we discourage use of the challenged procedure, it did not prejudice Flewallen's right to cross-examine adverse witnesses fully and effectively.

While primarily securing a criminal defendant's right to cross-examine adverse witnesses, the Confrontation Clause may prohibit the prosecution's use at trial of hearsay. *E.g.*, *Barber v. Page*, 390 U.S. 719 (1968). The Supreme Court has not adopted any particular approach, among several proposals, for "reconciling the Confrontation Clause and the hearsay rules...." *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980). Rather, "[t]he Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'" *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In short, the Clause envisions

> 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States*, 156 U.S. at 242-43."

Ohio v. Roberts, 448 U.S. at 63-64 (footnotes omitted) (second brackets in original).

Accordingly, the Court has developed a two-step process to determine the admissibility of hearsay against a criminal defendant. "First, in conformity with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S. at 65 (citations and a footnote omitted). However, a demonstration of unavailability may not be required where the utility of trial confrontation is sufficiently remote. *E.g. Dutton v. Evans*, 400 U.S. 74 (1970) (*discussed in Ohio v. Roberts*, 448 U.S. at 65 n.7). Second, even when a witness is shown to be unavailable, "[r]eflecting its underlying purpose to augment accuracy in the factfinding process...the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' *Snyder v. Massachusetts*, [291 U.S. 97, 107 (1934)]." *Ohio v. Roberts*, 448 U.S. at 65.

Applying this analysis in *Roberts*, the Court upheld the admission of a transcript of a prosecution witness' preliminary hearing testimony. It found that the testimony bore sufficient indicia of reliability where defense counsel's "questioning [at the preliminary hearing] clearly partook

of cross-examination as a matter of *form*...[and] comported with the principal *purpose* of cross-examination...." 448 U.S. at 70-71 (emphasis in original). The witness was unavailable "despite goodfaith efforts undertaken prior to trial to locate and present [her]." 448 U.S. at 74.

In *California v. Green*, 399 U.S. 149 (1970), a sixteen-year-old was arrested for selling marijuana to an undercover policeman. He named Green as his supplier and so testified at Green's preliminary hearing, at which the witness was extensively cross-examined by defense counsel. However, at Green's trial, the boy was evasive and uncooperative as a prosecution witness, saying he was uncertain whether Green was his supplier. Consequently, the trial court, over Green's objection, permitted the prosecutor to read excerpts from the witness' preliminary hearing testimony both to refresh the witness' recollection and as substantive evidence. Defense counsel was permitted to cross-examine the witness at trial regarding the truth and veracity of his prior testimony, and regarding his present recollection. 399 U.S. at 151-52. Under these circumstances, the Supreme Court found no violation of the Confrontation Clause.

Here, the availability of the declarants, whose hearsay statements were admitted, for full and effective cross-examination at trial satisfies the concerns expressed in *Roberts*, *Green*, and related cases. If a constructively cross-examined, out-of-court statement is admissible under the sixth amendment, as in *Ohio v. Roberts*, then previously uncross-examined statements also must be admissible where, as here, the declarants are subjected to extensive and effective cross-examination at trial.

Although need for the use of the recalcitrant witness' prior testimony clearly was present in *Green*, in terms of accuracy and reliability the instant case is not materially different. Indeed, Flewallen's ability to cross-examine the

declarants probably was greater than that of the defendant in *Green* because the witnesses in the instant case neither professed uncertainty nor expressed hostility. Thus, although necessity may have been absent, there was no error of constitutional magnitude in the instant case.

Finally, to the extent that the sixth amendment secures the right to have the trier of fact observe witnesses' demeanor, the opportunity for the jury in the instant case to do so during cross-examination was sufficient. Although a greater opportunity to observe demeanor may have been preferable, its absence does not render Flewallen's conviction constitutionally infirm.

In conclusion, although we do not condone or encourage use of the procedure challenged here, in the absence of any demonstrated or apparent prejudice to Flewallen occasioned by its use, we conclude that Flewallen's sixth amendment rights were not abridged. Thus, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

Per Curiam Opinion

JUDGMENT—WITHOUT ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
May 10, 1982.

Before
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*
HON. RICHRD A. POSNER, *Circuit Judge*

MARION DALE FLEWALLEN, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 78 C 707 Judge William E. Steckler
No. 81-2323	)	
vs.	)	
GORDON FAULKNER, *Respondent-Appellee.*	)	

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARION DALE FLEWALLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. IP 78-707-C
	)	
GORDON FAULKNER,	)	
	)	
Respondent.	)	

ENTRY

This cause is before the Court on the Petition of Marion Dale Flewallen for Writ of Habeas Corpus and respondent's Motion to Dismiss. The Court having examined said Petition and said Motion, memorandum of Law and the transcript of petitioner's state trial and being duly advised now finds that said Petition should be denied and respondent's Motion should be granted.

Petitioner Marion Dale Flewallen was found guilty of second degree murder in the Vanderburgh Superior Court on March 25, 1976. He has filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254(a). Although petitioner is incarcerated outside this District, his conviction was entered in an Indiana Court within this District and hence this Court has jurisdiction to proceed with a determination of the petitioner's claim. 28 U.S. §2241(d).

Petitioner's sole ground for asserting that he is entitled to

relief is the allegation that at trial his right to confront and cross-examine the witnesses against him was effectively denied and that such effective denial was violative of and contravened his Sixth and Fourteenth Amendment rights. The respondent is the executive officer of the agency to whose custody petitioner was committed upon sentencing. Petitioner appealed his conviction to the Indiana Supreme Court and included the issue raised in his present petition. His conviction was affirmed. *Flewallen v. State*, 267 Ind. 90, 368 N.E.2d 239 (1977). This court has been furnished with a copy of the transcript and record of the proceedings of the trial, and has examined it to supplement its determination of the merit of petitioner's claim.

At trial, the State called twenty-one (21) witnesses to testify. Of these, petitioner claims that six (6) witnesses were merely asked to identify, authenticate and adopt their prior statements to the police and testimony to the Grand Jury, then submit to further perfunctory repetitious direct examination and finally "handicapped" cross-examination. Five (5) witnesses did adopt their prior statements.

The petitioner is correct that the Indiana Supreme Court apparently based its decision largely on the question of hearsay, and relief principally on its decision in *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975). *Flewallen v. State*, *supra* at 241. The State Court made only cursory reference to the separate constitutional question. *Id.*

Petitioner states that the "sole substantive ground raised by petitioner Flewallen in his claim for habeas corpus relief is that the State Trial Court denied him the right to confront and effectively cross-examine the witnesses against him, in violation and contravention of the Sixth and Fourteenth Amendments to the United States Constitution". *Petitioner's Memorandum of Law.*

The pertinent text of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

The United States Supreme Court has emphasized that the confrontation clause reflects a preference for face-to-face confrontation at trial and that a primary interest secured by the provision is the right of cross-examination." *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980).

> "The primary object of the Constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief."
>
> *Mattox v. United States*, 156 U.S. 237, 242, 243, 15 S.Ct. 337, 339 (1895).
>
> "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of values furthered by the confrontation clause."
>
> *California v. Green*, 399 U.S. 149, 90 S.Ct., 1930, 1934 (1970).

The confrontation clause does not require excluding the out-of-court statements of a witness who is available and testifying at trial. It does not require exclusion of such statements by a witness who concedes making the statements and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of events in question thus opening himself to full cross-examination at trial as to both version. *California v. Green, supra.*

A careful examination has been made of the trial transcript conisting of three volumes totalling nearly 900

pages.This examination reveals that petitioner was represented by two counsel at the trial which lasted from March 16 to March 23, 1976. It further reveals that each witness, whose prior statements were admitted, took the witness stand at the trial, identified the statement in issue and five (5) conceded the statement was that of the witness. It also reveals that while each statement was read to the jury petitioner's counsel were given an opportunity to object to not only answers but questions as well and that the record is replete with objections which were made and sustained in addition to a voluntary exclusion of many questions and answers by the prosecutor. The introduction and reading of these statements were followed by cross-examination of the witnesses by petitioner's counsel, some of which examinations were lengthy and vigorous. Each witness could be observed by the jury throughout his or her testimony and cross-examination.

While this Court does not endorse the procedure used in this trial, the record clearly demonstrates that it does not infringe on petitioner's rights under the Sixth Amendment to confront witnesses against him as that right has been interpreted by the United States Supreme Court. *California v. Green, supra, Ohio v. Roberts, supra.* This being the sole issue upon which petitioner bases his Petition for Writ of Habeas Corpus, the Court finds that said Petition should be DENIED.

IT IS THEREFORE ORDERED that petitioner's Petition for Writ of Habeas Corpus is DENIED and this cause is DISMISSED.

WILLIAM E. STECKLER, *Judge*
United States District Court

Dated: July 15, 1981

Appendix D

Marion Dale FLEWALLEN, Appellant,

v.

STATE of Indiana, Appellee.

No. 976S304.

Supreme Court of Indiana.

Oct. 14, 1977.

Defendant was convicted before the Circuit Court, Vanderburgh County, Terre D. Dietsch, Special Judge, of second-degree murder, and he appealed. The Supreme Court, Pivarnik, J., held that: (1) trial court did not err in permitting statements of witnesses for State made to police, coroner and grand jury to be read to jury, in that witnesses were present at trial; (2) defendant failed to show prejudice resulting from question directed to his wife on direct examination by prosecutor whether she had pleaded guilty to charge of cruelty to a child in prior case, or from wife's affirmative answer; (3) defendant failed to show clear error resulting from hypothetical question directed to doctor testifying as defense expert witness which included background fact that defendant had at one time burglarized his parents' home, in that defendant's objection to question was sustained and jury was admonished to disregard question, and (4) any error resulting to defendant when doctor testifying as defense expert witness was allowed to read entire report of another doctor was harmless, in that report was compatible and even supportive of defendant's contention that he was temporarily insane at time of death of his wife's child.

Affirmed.

DeBruler, J., dissented and file opinion.

Rice & Vanstone, Thomas G. Krochta, Evansville, for appellant.

Theodore L. Sendak, Atty. Gen., Lesley A. Bowers, Deputy Atty. Gen., Indianapolis, for appellee.

PIVARNIK, Justice.

Appellant Flewallen was found guilty of the second degree murder of Erica Grigsby, the eighteen-month-old daughter of his wife, Virginia, by a former marriage. At the conclusion of a jury trial in Vanderburgh Circuit Court, appellant was sentenced on March 25, 1976, to life imprisonment.

The evidence was that appellant had beaten the child on occasions previous to her death, and that there were times when Virginia removed her from their apartment overnight for protection from these beatings. Several witnesses testified they saw a sign hanging on the baby's crib with the inscription "Erica is a Monster," and a picture there of a head in a hangman's noose. In the afternoon of August 30, 1974, Virginia went to the bedroom and left Erica in the presence of appellant in the living room. She heard an unusual noise and came running out to find Erica lying at the bottom of the stairs. Appellant was not present. Virginia ran out of the apartment carrying the child, calling for help. Shortly thereafter, appellant was seen outside the apartment by several neighbors. At trial, the physician who performed the autopsy on Erica stated that the cause of death was a puncture wound of the heart produced by a broken rib. In the doctor's opinion, this wound resulted from a forcible blow from a soft instrument, possible a hand, and not from the child's falling down the stairs.

Five specifications of error are submitted to use for review in this appeal: (1) that appellant's motion for discharge should not have been overruled; (2) that the admission of prior statements of several prosecution

witnesses, who were present in court and testifying, violated appellant's right of confrontation; (3) that it was error to allow the prosecutor to ask appellant's wife whether she ever had pleaded guilty to a charge of child cruelty; (4) that appellant's motion for mistrial should have been granted, because of a hypothetical question put by the state to appellant's expert witness which referred to appellant's previous criminal conduct; (5) that questions to appellant's expert by the state improperly incorporated another's diagnosis of appellant's motion condition made at another time.

I

[1] The indictment against appellant was filed on September 19, 1974, and he has been held in jail since that time. All parties agree that delay in coming to trial was occasioned by appellant's actions in moving for a change of venue, which was granted, and further moving for mental evaluation to determine competency to stand trial. During much of this time appellant was incarcerated in Norman Beatty Hospital, and was not returned to the Vanderburgh County Jail until March 4, 1975. On September 17, 1975, the court set this cause for trial by jury for December 1, 1975. Appellant objected to this setting, stating that it was six months after the March 4, 1975, date and that therefore he was subject to discharge under Ind.R.Crim.P. 4(A). Rule 4(A) provides that the defendant is entitled to release *on his own recognizance* after *six months* incarceration if the delay has not been occasioned by his own action. Ind.R.Crim.P. 4(C) provides that if the defendant is held for a total of *one year* with charges pending against him, and the delay not being occasioned by his own action, then he has a right to be *discharged*. The court properly overruled appellant's motion for discharge in this cause.

II.

[2] Over appellant's objection, the court allowed prior statements of witnesses for the state made to the police, the coroner, and the grand jury to be read to the jury. Although there were some minor conflicts, most of the statements were consistent with the statements giving by the witnesses on the stand, though the previous statements were more detailed in each case. Each witness confirmed that he or she had made the prior statement. Appellant claims that admission of these statements violated his Sixth Amendment right of confrontation.

This issue was decided by this court in *Patterson v. State*, (1976) 263 Ind. 55, 324 N.E.2d 482. The evidence in both *Patterson* and the present case was relevant as it was more detailed and thus more incriminating than the trial testimony of the witnesses. Here, as in *Patterson*, the witnesses were available for cross-examination and for the trier of fact to observe their demeanor and judge their credibility. Thus one of the primary reasons for the application of the old hearsay prohibition is missing; the insusceptibility of the evidence to cross-examination. The presence of the witness for cross-examination also disposes of any confrontation problem, pursuant to the rule of *California v. Green*, (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489. Since all of the witnesses whose prior statements in the form of voluntary statements to the coroner, the police, and grand jury were available at trial, and were in fact cross-examined by the defense, the statements were admissible and no reversible error occurred.

III.

[3] When Virginia Flewallen testified for the state, she was asked by the prosecutor if she had pleaded guilty to a charge of cruelty to a child in a case in the Vanderburgh Circuit Court. She answered in the affirmative. Appellant

objected to this question and answer, and moved for a mistrial. He argues on appeal that this testimony was improper, irrelevant and prejudicial, since "a husband and wife are often traditionally viewed as a single unit." Thus, the argument goes, this question and answer were meant to portray appellant as a criminal type who was married to a woman who could be cruel to a child, and who therefore sanctioned such behavior on the part of his wife. The state argues that the evidence could just as well be considered favorable to the defense, since it is an admission from the only other person in the apartment at the time of the child's death that she had been found guilty of child cruelty. We agree, and find that appellant has not met his burden of showing prejudice in this alleged error. *Hester v. State*, (1974) 262 Ind. 284, 291, 315 N.E.2d 351, 355.

IV.

In propounding a hypothetical question to Doctor Pontaoe, a defense expert witness, the prosecution included in background facts that appellant had at one time burglarized his parent's home. Appellant objected to this inclusion on the grounds that it was irrelevant, prejudicial, and not within the evidence.The objection was sustained and the jury was admonished by the court to disregard it. In *Young v. State* (1970) 254 Ind. 379, 386-87, 260 N.E.2d 572, 577, this court said:

> "Appellant was not harmed by the answer he objected to. He has overlooked the fact that he filed a plea of not guilty and a special plea of not guilty by reason of temporary insanity. Appellant was examined by psychiatrists who testified at the trial. On a plea of not guilty by reason of insanity appellant opened the door for the admission of testimony as to his entire life, certainly any criminal record he ha[d] and any admissions he may have made relative thereto."

Appellant in this cause also entered a plea of temporary

insanity, and the evidence in question would fall under the same test as *Young v. State*, above.

[4-6] Furthermore, an admonishment to the jury is presumed to cure any error. The granting of a mistrial is within the sound discretion of the trial court and clear error in the court's overruling of a motion for mistrial must be shown to mandate reversal of a conviction. *Dewey v. State*, (1976) Ind., 345 N.E.2d 842. The appellant has the burden of proving that alleged misconduct requires either a mistrial or reversal on appeal. No such clear error appears here since the jury was admonished, creating a presumption of correction of error which has not been rebutted.

V.

[7] While the same expert witness was testifying on cross-examination, the prosecutor asked him if he had examined the report of one Doctor Tullen. The witness stated that he had, and was allowed by the court to give the entire report of Doctor Tullen from the witness stand. Doctor Tullen's report was not inconsistent with the witness Doctor Pontaoe's testimony. It was Dr. Pontaoe's opinion that appellant was temporarily insane at the time of the commission of the act in question, and he further had the opinion that Doctor Tullen's report would confirm this. Doctor Tullen's report contained observations of appellant in 1970, and a diagnosis of appellant as a "sociopathic" personality.

[8] While an expert opinion as to the defendant's mental condition by a person not available for cross-examination is not admissible testimony, such report may be used as a basis of a testifying expert's opinion as to the defendant's sanity if it is in a form that he would normally use in making his professional evaluation. *Smith v. State*, (1972) 259 Ind. 187, 285 N.E.2d 275, *cert. denied* 409 U.S. 1129, 93 S.Ct. 951, 35 L.Ed.2d 261 (1973). It was improper for the

court to permit Doctor Pontaoe to read the entire report including Doctor Tullen's diagnosis. However, we fail to see how doing so in this case in any way prejudiced the appellant. Appellant was urging the defense of temporary insanity, and had presented Doctor Pontaoe to prove that such a condition existed. Doctor Pontaoe testified that after studying the report in question, he believed it compatible and even supportive of his stated opinion that the defendant was, in fact, temporarily insane at the time of the death of this child. Therefore, any error in permitting the reading of the report was harmless.

Since we find no reversible error in these specifications, the judgment of the trial court is affirmed.

GIVAN, C.J. and HUNTER and PRENTICE, JJ., concur.

DeBRULER, J., dissents with opinion.

DeBRULER, Justice, dissenting.

This cause involves the wholesale use of prior testimony and out-of-court statements of less than enthusiastic prosecution witnesses during their direct examination. Five statements given by witnesses to the police, one statement to the coroner, and six sets of grand jury testimony were read, virtually in their entirety, to the jury during the examination of six witnesses. The extrajudicial statements of two of the witnesses were introduced and read only after those witnesses had been questioned as to the events involved and had professed difficulty in remembering those events. *The remaining four witnesses were simply called to the stand for the purpose of authenticating their respective statements and testimony, which were read to the jury before these witnesses were asked any questions about the events surrounding the death of Erica Gribsby.*

The majority sanctions this indiscriminate use of extrajudicial statements by relying on this Court's holding

in *Patterson v. State*, (1975) 263 Ind. 55, 324 N.E.2d 482, that out-of-court statements are not inadmissible as hearsay when the declarant is available at trial for cross-examination. *Patterson* did not consider a criminal defendant's Sixth Amendment right to be confronted with the witnesses against him. The majority "disposes of any confrontation problem" by relying on *California v. Green* (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489. It is true that *Green* contains such language as this:

> "Viewed historically...there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination....
>
> "[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." 399 U.S. at 158, 162, 90 S.Ct. at 1935, 1937, quoted in *Nelson v. O'Neil* (1971) 402 U.S. 622, 626-27, 91 S.Ct. 1723, 1726, 29 L.Ed.2d 222, and *Oritz v. State*, (1976) Ind., 356 N.E.2d 1188, 1194.

I cannot believe, however, that the Supreme Court intended to relieve the State of the obligation to make any attempt to prove its case through the testimony of sworn witnesses given in open court where the trier of fact can observe their demeanor and where cross-examination takes place more or less contemporaneously with the testimony's reception. In *Green* the witness whose out-of-court statement was used was questioned about the facts of the offense but professed a lack of memory as to those facts due to drugs he had taken. The Court was therefore required to choose between permitting substantive evidentiary use of his prior statements and the total loss of relevant and necessary evidence. The danger of losing such evidence, in the *Green* Court's view, warranted admission

of the statements despite diminished confrontation protection.

No one seriously asserts that cross-examination as to extrajudicial statements is the full equivalent of cross-examination of testimony given at trial; the most that is attributed to such substitute confrontation is that it is to be preferred to the loss of the evidence contained in the extrajudicial utterance.

> "The most essential difficulty with the claim that cross-examination is 'by hypothesis' not requisite when the prior contradictory declarer is physically present is this. It denigrates the real office of cross-examination. Cross-examination postulates a witness who avows a thing under interrogation by a lawyer who would have him deny it, or a witness who denies a thing under inquisition by lawyer who would have him affirm it. Cross-examination is thus essentially adversary. Cooperation is the antonym of cross-examination. The measure of the cross-interrogator's success is the extent to which he is able to destroy the witness's testimony in chief, shake the witness, elicit retractions, destroy his credibility. If the witness declines to adopt his former statement as true, no adversary, cross-examination about it is possible." Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*,3 Ind.L. Forum 309, 317-18 (1970) (Footnote omitted); See also Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.Rev. 43, 53 (1954).

As the Minnesota Supreme Court noted:

> "The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is the immediate application of the testing process. Its strokes fall while the irons is hot." *State v. Saporen*, (1939) 205 Minn. 358, 362, 285 NW. 898, 901.

The Michigan Supreme Court has said of cross-examination as to extrajudicial statements:

> "The would-be cross-examiner is not only denied the right t be the declarant's adversary, he is left with no choice but to become the witness' friend, protector and savior. Though he may be permitted to ask questions in the form of cross-examination, the substance of his effort will be redirect examination and rehabilitation. The reason is simple. The witness cannot recant. Every cross-examiner tries to bring the witness to the point where he changes his story—literally eats his words—in the presence of the jury...No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain *why* he has changed his story before coming to court, with the jury being left to infer that he might have been induced to change his story in the intervening months or years, for some unrevealed and sinister reason." *Ruhala v. Roby*, (1967) 379 Mich. 102, 125, 150 N.W.2d 146, 156.

Where no effort to elicit testimony from the witness concerning the facts in issue is made at trial, no such compelling reason exists for dispensing with the safeguards our legal system provides for assuring the trustworthiness of evidence: the oath, observation of the witness' demeanor, and contemporaneous cross-examination. Permitting such evidence will cause criminal trials in this state to resemble trials in the English prerogative courts, whose reliance on *ex parte* affidavits to convict accused persons was a principal evil sought to be remedied by the constitutional guarantee of confrontation of one's accusers. See *California v. Green*, *supra*, 399 U.S. at 156-157 nn. 10-11, 90 S.Ct. 1934.